Commission on Health and Safety and Workers' Compensation

MINUTES OF MEETING
January 5, 2011
Elihu M. Harris State Building
Oakland, California

In Attendance

2010 Chair Angie Wei

Commissioners Catherine Aguilar, Faith Culbreath, Sean McNally, Kristen Schwenkmeyer, Robert Steinberg

Executive Officer Christine Baker

Absent

Darrel (Shorty) Thacker

Approval of Minutes from the August 19, 2010 CHSWC Meeting

CHSWC Vote

Commissioner Culbreath moved to approve the Minutes of the August 19, 2010 meeting, and Commissioner McNally seconded. The motion passed unanimously

Election of 2011 Chair

Chair Wei asked for nominations for the 2011 Chair of the Commission representing the employer community.

CHSWC Vote

Commissioner Aguilar moved to nominate Sean McNally for 2011 Chair. Commissioner McNally accepted the nomination. Commissioner Schwenkmeyer seconded. The motion passed unanimously.

Chair McNally proceeded to conduct the meeting. He announced that the "Report on Liens" would be moved toward the end of the meeting.

Ms. Baker stated that she would like to inform the Commissioners that Commissioner Thacker is not present today. He is a stalwart of the Commission and is facing some difficult health issues. We wish him a speedy recovery, and our thoughts are with him.

Compound Drug Study, DRAFT Report

Barbara Wynn, RAND

Ms. Wynn stated that she would present preliminary findings from the study on the use of compound drugs in workers' compensation and that more work will be done before the report is finalized. She stated that a recent California Workers' Compensation Institute (CWCI) report documented payments for compound drugs, co-packs (combinations of medical foods and a drug), and medical foods, which grew from 2.3 percent to 12.0 percent of pharmaceutical expenses between the first quarters of 2006 and 2009. This means that compound drugs are a significant part of pharmaceutical payments. The average payment during January-March 2009 for compound drugs was $551; for co-packs it was $410; and for medical foods, it was $332. In 2010, Assembly Bill (AB) 2779 (Solario) was proposed which tightened coverage requirements and fee schedule allowances for compound drugs, but it was not passed. The Legislature asked the Commission to prepare a background paper and recommendations on the use of compound drugs, co-packs, and medical foods, and the Commission asked RAND to assist with the study and report.

Ms. Wynn stated that preliminary insights were gathered from: an environmental scan of the literature and review of relevant websites; telephone interviews with individuals representing different perspectives on compound drugs; and a review of a sample of bills for compound drugs. Additional interviews are planned to gather more information on medical foods and co-packs, and more investigation is planned on bill review and pricing issues.

Ms. Wynn stated that the key study questions include:

- What are compound drugs and how are they regulated?
- What products are commonly furnished to workers' compensation patients? Are they safe and effective? When are they medically appropriate?
- How is payment determined under the Official Medical Fee Schedule (OMFS)?
- What tools do payers and employers have within workers' compensation to address appropriate use of compound drugs? What tools do other payers use?
- Are there policy shortcomings in workers' compensation that should be addressed and if so, how?

Ms. Wynn stated that in terms of the regulation of compound drugs, the FDA has responsibility for assuring that commercially available drugs, both prescribed and over-the-counter (OTC) drugs, are "safe and effective." Commercially available prescription drugs have to go through a pre-marketing process; those drugs may combine several active ingredients. FDA approval is for specific indications, but physicians may prescribe off-label usage for other conditions, and they do. In addition, most OTC drugs are marketed in compliance with FDA regulatory standards and are deemed "safe and effective"; they do not need separate approval.

Ms. Wynn stated that traditional compounding involves pharmacies combining drug ingredients to meet the specific needs of specific patients who may, for example: be allergic to inactive ingredients in FDA-approved drugs; or require a different dosage strength; or cannot take FDA-approved oral medication. Pharmacy compounding is regulated by state code governing the practice of pharmacy. Traditionally, the FDA regards compounding as a public health benefit

and does not regulate specific compound drugs; however, the FDA has noted that some pharmacies are making and distributing compound drugs for a broader patient population, and it believes that those pharmacies are actually manufacturing products that should be subject to the FDA approval process. A few years ago, the FDA has issued warning letters to five compounding pharmacies; however, the practice is continuing.

Ms. Wynn stated that the FDA has issued "Red Flags" for enforcement action in the following cases:

- The product was removed from the market as unsafe or ineffective.
- The product is essentially a copy of a commercially available FDA-approved drug.
- The drugs are compounded in advance of receiving prescriptions, except in very limited quantities based on prior prescriptions. This is a key loophole in the broader distribution to workers' compensation patients.
- The product contains bulk active ingredients that are not FDA-approved drugs.
- The pharmacy uses drugs without assuring they were manufactured in FDA-approved facilities.
- The pharmacy does not conform to applicable state law regulating the practice of pharmacy.

Ms. Wynn stated that California's Code of Pharmacy is concentrating on quality assurance standards but seems to allow compounding based on physician preference for a particular formulation rather than on individual patient need. The Code specifies that no product shall be compounded prior to receipt of a prescription for an individual patient unless a limited quantity is needed to ensure continuity of care for an identified patient population. The Code allows up to a 72-hour supply to be furnished to a prescriber for distribution to a prescriber's patients or for use in the office.

Ms. Wynn stated that most compound drugs prescribed for workers' compensation patients are topical analgesic creams and lotions. She discussed a sample bill for a physician-dispensed product submitted by a third-party biller for a total charge of $607 for a 20-day supply. There are five active ingredients in the bill. There is no National Drug Code (NDC) for a compound drug but for the individual ingredients if they are manufactured in a facility that has FDA approval. The Division of Workers' Compensation (DWC) requires that each ingredient be identified by an NDC. The NDC identifies the drug product, but that does not mean the drug itself is FDA-approved.

Ms. Wynn stated that there is a mixed picture on the safety of local anesthetic products. There is no systematic collection of information on adverse events and potential safety issues. Topical analgesics are recognized as acting locally with lower risk of systemic adverse effects than other drugs. The FDA has issued consumer warnings about this. A 2006 limited survey of compounded drugs found problems with incorrect potency levels, including high concentrations of local anesthetics, which have risk of seizures and irregular heartbeats; there have even been two reported deaths.

Ms. Wynn stated that the medical treatment utilization guidelines for chronic care contain policies related to topical analgesics. The guidelines were adopted effective July 18, 2009. A

compound product is not recommended if it contains a drug that is not recommended under the guidelines. Most of the high-volume compound drug ingredients identified in the CWCI report are either not recommended in medical treatment guidelines either because there is no evidence base to support their use (e.g., gabapentin, baclofen), or because they are recommended only after other treatments have been tried unsuccessfully (e.g., capsaicin, lidocaine, ketamine HCL); this is called step therapy, where means that FDA-approved drugs are used as the first line of therapy. Ms. Wynn stated that none of the active ingredients in the sample bill are recommended as first line of therapy:

Ms. Wynn stated that financial incentives may drive compound drug use more than medical need. This point is taken off the website of a compound drug vendor. Payment is determined under the OMFS. For simple prescriptions, the MediCal price is the unit price for the ingredient (determined by NDC) times the number of metric decimal units plus a dispensing fee. For compound drugs, each ingredient is priced separately with a single dispensing fee; a compounding fee is added based on the dosage form and route of admission and, if applicable, a sterility fee. Most unit prices are based on 83% of the average wholesale price (AWP) for a drug. The AWP is the manufacturer's suggested "sticker price" for wholesalers to charge pharmacies and does not represent actual pharmacy acquisition costs. This is similar to the sticker price on a car where you know that something lower than that sticker price is being paid.

Ms. Wynn stated that DWC has specific instructions for compound drugs. The instructions require that each ingredient needs an NDC number. Ingredients for which there is no NDC number at all are not separately reimbursable. Ingredients whose NDC number is not in the Medi-Cal database should be priced using the methodology in the rules adopted a few years ago for repackaged drugs. There are two steps in that process; first, the NDC unit cost in the MediCal database is used for the underlying ingredient; if the underlying ingredient is not in MediCal database, then 83% of the lowest-priced therapeutically equivalent drug is used. Mrs. Wynn stated that these instructions have not been codified through rulemaking and, more importantly, they don't address the issues in compounding.

Ms. Wynn then stated that DWC instructions do not fully address pricing of compound drug ingredients. The rules for repackaged drugs do not work well for bulk drug ingredients that are not in the MediCal database. Bulk drugs do not have an "underlying ingredient" that can be used for pricing. In addition, the therapeutic equivalence is determined for FDA-approved drugs and is not directly applicable to bulk ingredients. That is one issue with the OMFS. The other issue is that the allowances are based on self-reported AWP by a single manufacturer are vulnerable to abusive reporting practices, i.e., the manufacturer raises rates, and this does not take advantage of lower pricing for multi-source generic drugs that are commercially available. Also, not all ingredients have an NDC.

Ms. Wynn then focused on the tools that employers and payors have to assure appropriate use of compound drugs:

- The most fundamental too is the Labor Code requirement that care be provided consistent with evidence-based medicine; the MTUS chronic care guidelines contain recommendations on the medical appropriateness of some but not all ingredients used in common compound drugs.

- The OMFS fee schedule provisions can be used, albeit imperfectly, to make payments reasonable for covered services, though many are still much higher than those for prescription drugs.
- The most powerful tool in terms of its potential is the employer right to establish medical provider networks (MPNs) and to contract selectively, although it has been used effectively by only a few employers. RAND interviewed some the employers who control the doctors in their MPN to only use the pharmacies' formulary; one MPN even prohibits physician-dispensing.
- Payors can contract with Pharmacy Benefit Managers to manage their pharmaceutical claims and perform functions such as medical review, negotiating prices, and establishing a formulary. All of those are a little harder to do in workers' compensation than under group health programs.

Ms. Wynn stated that other tools that payors use include:

- Some require prior authorization for compound drugs; e.g., MediCal requires that for any Drug not on its contract list and Aetna requires it.
- Some maintain a formulary for approved drugs, which is tantamount to not covering compound drugs, because most compound drugs will not be in a formulary.
- Some require step therapy where FDA-approved drugs are tried first.
- Some limit physician-dispensing.

All of the above strategies can be used in MPNs. In addition, the last strategy that is used is tiered pricing; however, this is not applicable to workers' compensation.

Ms. Wynn stated that the study and addresses whether there are policy shortcomings in workers' compensation that should be addressed and if so, how. She stated again that she is presenting preliminary findings and recommendations that are subject to fine-tuning. The recommendations include that: (1) updating and expanding the MTUS to address compound drugs as a product class; one of the issues that could be addressed is that the product must have one or more ingredients approved (in the same or different form) in an FDA-approved prescription; some of the compound drugs are OTC compound drugs, with no prescription drug involved, and the question is whether they should be paid more than the cost of the individual components; (2) incorporating certain restrictions embodied in the FDA's "red flags" into the guidelines. (3) determining whether FDA-approved drugs should be tried prior to prescribing the compound drug; (4) determining what kinds of restrictions are appropriate or needed on consecutive dispensing of 3-day supplies of compound drugs. In addition to these generic issues/recommendations, the MTUS should also address the evidence base supporting the efficacy of the other ingredients frequently used in compounding that are not currently addressed.

Ms. Wynn stated that finally, the OMFS should be revised to explicitly address compound drugs by: (1) providing clear guidance on how to price compound drug ingredients that are not in the MediCal database; this would set a reasonable allowance for costs; and (2) considering ways to set a reasonable allowance for the ingredient costs that does not recognize potential manipulation of AWP prices by manufacturers, e.g., the lowest price among bulk ingredient manufacturers in database.

Ms. Wynn also stated that legislative changes through Labor Code revisions might be considered. She cautioned that Labor Code revisions would address the problem quickly but could constrain flexibility to address evolving issues and unintended consequences. One approach might be to adopt the model used for the MTUS, which uses the ACOEM guidelines as a default until regulations are issued. In addition, generic coverage limitations which could draw from the FDA "red flags" could be considered. Finally, any OMFS changes would not have to be permanent but could be effective until the Administrative Director (AD) issues fee schedule regulations for compound drugs.

Ms. Wynn stated that in conclusion, there are a number of complex issues with compound drugs. From the review of the material and the interviews, it is clear that the work is ongoing and more information will be added to describe these issues.

Questions from Commissioners

Commissioner Wei asked if there is a sense of the percentage of drugs that have an NDC code but are not FDA-approved, and Ms. Wynn responded that the closest data would be the CWCI report and that she would have to look into that. Commissioner Wei asked if there is any sense of scale. Ms. Wynn responded that the FDA does not approve bulk ingredients and anything compounded from a bulk ingredient is not FDA-approved. However, the establishment has been basically approved. The number without NDC codes would be relatively small because if there is an NDC code, payment is more rapid. Commissioner Wei stated that with an NDC code, you can game the system. Commissioner Wei stated that Ms. Wynn described a number of interventions that MPNs might do and she asked what the barriers are to MPNs or payors to using those interventions. Ms. Wynn stated that payors have tended to lease the networks but that selective physician contracting could be effective and attractive. State Fund is concerned about being able to selectively contract which would be tantamount to excluding providers, because they hold such a high market share. She stated that RAND is looking at MPNs more specifically.

Public Comments and Questions

Ms. Baker stated that once the draft report is available from RAND, the Commission would like to immediately release the report to the Legislature and post it on the Commission's website. Chair McNally asked when that would be available, and Ms. Baker and Ms. Wynn responded that it would be within the next three weeks.

Steve Cattolica, California Society of Industrial Medicine and Surgery (CSIMS), stated that it might be a mistake to release the preliminary report to the Legislature if more work is done, because it could be misleading. Ms. Baker stated that the presentation is preliminary, but the report is not. Additional information will be added over the next few weeks before the report is released to the Legislature and posted on the Commission's website. Mr. Cattolica asked if the additional information would be open to public comment, and Ms. Baker stated that it would.

Commissioner Wei stated that the report is in response to a Legislative request, and that any additional feedback will be incorporated in the report and available for public comment.

CHSWC Vote

Commissioner Aguilar moved to approve for release the draft "Compound Drug Study" report prepared by RAND to be sent to the Legislature and for posting and feedback, and Commissioner Culbreath seconded. The motion passed unanimously.

Evaluation of the Effectiveness of California's Injury and Illness Prevention Program and Compliance Officers' Inspections Update

John Mendeloff, RAND

John Mendeloff, RAND, stated that he will discuss the preliminary findings of the Injury and Illness Prevention Program (IIPP) study, conducted with co-authors from other RAND offices and other places. He stated that we would present background, the purpose of the study, preliminary findings and next steps.

Mr. Mendeloff stated that the IIPP standard is a specific program that was implemented by Cal/OSHA in July 1991. IIPP is distinct from other standards that Cal/OSHA has because it is not hazard-specific with standards such as machine guarding or rails on scaffolds. Instead, the IIPP program deals with underlying issues such as requiring workplaces to adopt key elements of a systematic safety and health program. The program establishes clear lines of responsibility for safety activities and mandates safety training, surveillance of hazards, investigations of injuries, and communicating standards to employees. There are also requirements for documenting the hazard survey and the training given to employees.

California is one of the first states to have an IIPP program and only one of a small number of states that has such a requirement. The federal government is now considering adopting a similar type of regulation. Therefore, it seems timely to determine what the benefits of this program are for California and if it promises benefits for other states as well.

Mr. Mendeloff stated that the IIPP is one of the most frequently cited standards in Cal/OSHA inspections; about 25 percent of all Cal/OSHA inspections cite the IIPP, and it applies to all industries and workplaces in California. Some of the small workplaces have some different documentation requirements, but aside from this, the program is similar. Mr. Mendeloff stated that the goal of the study was to learn about the implementation and the impacts of the IIPP standard. The study has been reviewing data since 1991. Unfortunately, there is no inspection data prior to 1990 for California, because it did not participate in the national system before then, and that was a limitation that had to be addressed. The study examined several sources of fatality data because at the aggregate level, the data for non-fatal injuries have too many variables, so this study reviewed fatality data instead.

Mr. Mendeloff stated that the three questions addressed in this study are: whether California workplaces' comply with the standard; whether compliance improved over time; and whether compliance has a positive effect on injuries and fatalities. The RAND study did not include the

construction industry because of the difficulty of linking inspection data and injury data in that industry.

He showed that in mid-1991 and mid-1992, close to 40 percent of inspections cited firms for non-compliance with the IIPP standard, and then that number dropped down to about 30 percent in 1993; after 1993, the compliance rate changed minimally until 2006. 2007 data can be ignored because it is a partial year. For 1993 to 2006, compliance did not change very much, and at face value, that is not that desirable, and it would be hoped that better compliance would result over time.
Although the number of IIPP violations per inspections has been stable over the years, we find that firms that are re-inspected show much better compliance over time. For a workplace with two inspections, the first inspection resulted in an average of .41 IIPP violations, but during the second inspection, the same workplace had .19 IIPP violations; as the inspections proceeded from the first sequence to the second to the third sequence, there is a decline in non-compliance. Those workplaces that are inspected become more compliant over time, and the number of violations decreases to about 11 or 12 percent; the first inspection had 40 percent of violations, but the violations decreased to 10 percent after multiple inspections.

However, workplaces inspected for the first time do not show evidence of improvement over the years. Workplaces inspected for the first time showed no better compliance in 2006 than they showed in 1993. Mr. Mendeloff stated that the lack of improvement is disturbing. Not every workplace can be inspected, and outreach efforts other than inspections appear not to have been effective in promoting the IIPP standard. Mr. Mendeloff stated that some thought has to be given to how one gets to other firms by using other methods that might be more effective at convincing firms that they need to improve in this area.

Commissioner Wei asked if employers were only being cited for lack of an IIPP or if it is one of many different citations about the worksite as a whole. Mr. Mendeloff responded that in about 10 percent of the cases, only the IIPP is cited, but in 90 percent of the cases, the IIPP is cited along with other violations. The second conclusion from the data is that workplaces that have more inspections have fewer IIPP violations in that first inspection. If there are five or six inspections, in the first inspection sequence, one gets only .23 or .26 IIPP violations, not .37 or .41 IIPP violations. This indicates that workplaces that have a higher number of inspections tend to have better compliance, perhaps because they have more complaints, or they are bigger workplaces, or they are more likely to be unionized.

Mr. Mendeloff stated that in non-union workplaces, about 33 percent of inspections have citations, and in unionized workplaces, the violations were less than half the 33 percent. The larger workplaces and unionized workplaces have better compliance, and compliance does improve over time. Re-inspections therefore indicate that inspected firms improve compliance over time. The initial compliance is better at workplaces that receive attention usually due to complaints to Cal/OSHA.

Mr. Mendeloff stated that the study also addressed whether compliance has a positive effect on injuries and fatalities. The study has fairly accurate data for fatalities. Mr. Mendeloff stated that the study was in the process of more establishment-level analysis of non-fatal injury rates, but

those results were not completed as yet, so they would not be discussed at this time. Mr. Mendeloff stated that there are three main types of inspections that Cal/OSHA performs: accident investigations; complaint investigations; and program inspections. Another point of concern is that the standard took effect in mid-1991, and there is no good fatality data prior to 1992, because that is when the federal government's new system took effect. Beginning in 1992 and over the next five or six years when the IIPP was in effect, this study does not find that California's overall fatality rate improves relative to the rest of the country; in fact, the result is the opposite:. The data in the study do not include motor vehicle fatality rates and crashes and assaults, which do not deal with traditional safety and health programs.

However, despite the absence of any relative improvement in the overall fatality rate, Mr. Mendeloff stated that fatality rates in the California construction sector dropped sharply in 1993 and stayed lower in subsequent years, although the margin decreased as the years went by.

Mr. Mendeloff stated that on the issue of the impact of compliance on injuries, the data are mixed, and the next steps to look at to get a firmer conclusion have to do with looking at workplaces that are actually inspected and identifying what happens to changes in fatalities and actual injury rates compared to those places that were inspected and did not have problems with IIPP compliance. In other words, the analysis would address whether increased compliance in individual workplaces leads to lower injury rates and lower fatality rates.

Mr. Mendeloff stated that he anticipates finishing this report by the end of February and making it available for further comments. He stated that he is trying to look at fatality data from other sources in order to look prior to 1992 to see what those trends are. This should have some impact on how California looks at its standard. Mr. Mendeloff stated that over time, many if not most workplaces get inspected. He stated that the findings about impacts may useful to the federal government as it considers which policies to follow.

Questions from the Commissioners

Commissioner Aguilar asked if there was a specific event in 1998 that caused the spike in fatalities, and Mr. Mendeloff responded that there was no specific event or disaster. Commissioner Aguilar replied that it is alarming and also apparent to her that compliance increases with the IIPP, because people who know they are being watched increase their compliance; and just by raising awareness of the program, accidents will be reduced.

Commissioner Aguilar stated that she also wanted to take this opportunity to state that the Commission decided to utilize funding it had received from fines for Cal/OSHA IIPP violations for schools and developed a program called the School Action for Safety and Health (SASH) that has produced training materials for school districts to support IIPP compliance. Commissioner Aguilar stated that she participated in the program and recently went through this training with the San Francisco Unified School District. The training and the materials were great, and participation by those who came was excellent. Commissioner Aguilar stated that she would like to follow a specific group of people who have taken this additional training on what IIPPs are, why you need them, how important they are, and how to implement them. Although schools do not have arduous types of work and injuries, there are injuries in schools. Commissioner Aguilar

stated that falls are the biggest types of injuries hurting people and playground attendants. Commissioner Aguilar stated that she believes that if there are no injury prevention programs, then people will not learn about safety. Chair McNally thanked Commissioner Aguilar for her comments.

Commissioner Wei stated that it appears that California's fatality rate is still lower than the national average, and Mr. Mendeloff responded that that was correct. Commissioner Wei stated that that should speak to the safety effects of having an IIPP program. She asked whether overall, one of the take-away messages from Mr. Mendeloff's presentation could be that having an IIPP results in a lower fatality. Mr. Mendeloff responded that the study is trying to look at good fatality data prior to 1991 when the IIPP came in, and the 1991 data will help to explain whether it was due to when the IIPP came in or whether it was a long-term trend. Mr. Mendeloff also stated that it is important to note that California has high lost workday injury rate that is largely the effect of good reporting and of having a three-day waiting period. Mr. Mendeloff stated that some work recently done shows that states that have a high injury rates (non-fatal injury rates) tend to have low fatality rates, and California is one of those states. California has low fatality rates in construction and agriculture. If one bases the judgment on non-fatal injury rates, the rates in California are very high. Mr. Mendeloff stated that there are important lessons there about the need to analyze the measures that are used to assess performance.

Commissioner Wei stated that having an IIPP could potentially explain both those factors. Mr. Mendeloff responded that for instance, in construction, California's permit policies are fairly unique among states. California construction policies require companies to notify and obtain permits especially when they are performing dangerous work, such as trenching and erecting scaffolds over a certain height, and let Cal/OSHA know that they are performing dangerous work; the construction regulations that were adopted in the early 1970s have led to a decline in injuries. Identifying how much of the decline in injuries is due to the IIPP is difficult, but some of the California policies have contributed to the reduction. California also does more inspections in agriculture than any other state. Mr. Mendeloff stated that federal OSHA does not make a serious effort to enforce safety standards in agriculture. Commissioner Wei asked if it is worthwhile to note how many dangerous worksites are in California compared to the rest of the U.S.

Commissioner Wei also stated that specific to the agricultural industry, Mr. Mendeloff did not provide fatality data related to transport or motor vehicle accidents. There are fatalities in agricultural industries where migrant workers are being transported and farm workers are being moved in passenger vans without seat belts, so it may be worthwhile to consider that data. Mr. Mendeloff stated that the study had not included these because they are not covered by any of the Cal/OSHA standards.

Chair McNally stated that Grimmway Farms has significant operations in Colorado, and Grimmway Farms takes the approach in Colorado that they take in California which is instant notification. Colorado does not have a state OSHA program like in California; Colorado only has federal OSHA. There is very little response in Colorado and there is almost no onsite post-accident investigation like there is in California; it is a very different culture than in California.

Public Comments and Questions

Len Welsh, chief of Cal/OSHA, thanked Mr. Mendeloff for this study and stated that it is long overdue. Mr. Welsh stated that Mr. Mendeloff's study has "scratched the surface" and he would like this type of research mode to continue because there are a lot of questions that need to be answered about the actual impact of what Cal/OSHA regulation does. This topic has been of great interest over the past several years, and Cal/OSHA has tried to use its heat illness inspection program for outdoor work, in particular in agriculture, to try to conduct an experiment to see if Cal/OSHA can adopt policies, both regulation and enforcement and outreach, education and partnering, and measure the impact of those policies on actual injuries, illnesses, and fatalities.

Mr. Welsh stated that the study's approach of focusing mostly on fatalities, at least initially, is a wise one because these are the data that we have the most confidence in, and there seems to be a convergence between injuries and illnesses, as reported on the one hand, and fatalities. Those states that have a higher incidence of reported injuries and illnesses tend to have lower fatality rates, and the interpretation is correct, because what is happening is better reporting of injuries and illnesses while fatalities are harder to hide in the U.S., no matter what the state is, so fatality data are the most reliable. There are real differences in the way that injuries and illnesses are reported in various states, and Mr. Welsh stated that he does not believe that the injury and illness data are accurate, and currently the data are not reliable because it is easy to hide that data. There are many economic and social factors that go into whether those events are faithfully reported, and there is a lot of breadth in the data because anything that results in restricted or lost work is supposed to be reported, but that data are mixed in with the most serious events such as when somebody is almost killed; therefore, these data include so much that it makes them very unreliable.

Mr. Welsh asked what the reason is that the study does not have fatality data after 2002. Mr. Mendeloff stated that he was focusing on the earlier years, and he did have the data on all the years, so they will be looking at different periods through the present. It is possible that when there is a new standard, it may have an immediate effect, but after that, it may be difficult to find an effect and they may need to study different periods to see what is going on; and this is aggregate data and we need another set of data to see what happens when we introduce it. Mr. Welsh stated that it is important to see where we are now because of the way Cal/OSHA partners with industry; it may be that the IIPP will become a strong tool for enforcement and partnering over time once Cal/OSHA develops the sophistication it needs to take maximum advantage of those tools. Mr. Welsh stated that he would encourage Mr. Mendeloff to bring that data forward to make it as current as possible. Mr. Mendeloff responded that it is always harder to perform an evaluation of a program that started 20 years ago, and it is much easier when a new program is being introduced to think about what data are needed and how to collect them. Mr. Welsh stated that he is not criticizing Mr. Mendeloff or the study but is just interested in the question.

Mr. Welsh stated that there are only so many results one can get from this "broad brush" approach in the study which includes the IIPP in the entire mix and attempts to see what happens in the workplaces in California regardless of the concentration of industries and regardless of the mix of high-hazard versus median-hazard versus low-hazard industries. Currently, Cal/OSHA is

in the mode of targeting, and Mr. Welsh stated that he would like to know what happens when Cal/OSHA targets a particular industry segment. When one identifies that there is a niche segment that is particularly problematic, whether the key factor is workplace culture or high incidence of fatalities or incidence of a particular injury, and if one focuses on that, it gives a much more closely defined database and much more of an opportunity to determine whether the focus on that segment is going to have an impact. Mr. Welsh stated that he recommended the following: Cal/OSHA should have a sophisticated program through which it identifies a particular industry segment to target because there is an issue that Cal/OSHA thinks it can impact; then Cal/OSHA begins by providing information to that industry segment about what the issues are and how they need to address them; then it targets that segment through enforcement and tracks what happens, assessing whether the message came through initially and whether the message sticks over time. After those steps, Cal/OSHA would come back in a year and target new places of employment within that industry segment; and after that, Cal/OSHA would come back three years or five years later to see to see how well it delivered the message to the industry segment and whether that message "sticks" with the industry.

Mr. Welsh stated that there are two sets of data that come from this process; one set of data is from employers who were visited and who were visited over and over again; and the second set of data is from others who are visited a second time around after various lengths of time to see what type of message Cal/OSHA delivered. Mr. Welsh believes that this methodology can also be followed with the IIPP. Mr. Welsh stated that he would like to work with Mr. Mendeloff to come up with study parameters to do that and that he believes that they will get much clearer data on what is correct and incorrect about getting the message across. It is important to say that it is not just a matter of a "big stick," but it is a matter of providing the information to the industry so they know what the issue is and they can put themselves in perspective relative to everybody else, and they get the tools for compliance and there is an educational component, a partnering component, and good hard-hitting enforcement for people who do not get the message. Mr. Welsh stated that this is part of trying to glean some sort of interpretation about the impact of the IIPP. He also stated that he believes that they should look at what type of non-compliance there is with the IIPP. Often, the first thing that inspectors look at is the piece of paper, an IIPP, because it shows that the entity has attempted to confront the issue of the IIPP to begin with. Mr. Welsh would like to know the correlation between employers having this piece of paper (the IIPP) and their efforts to do something to implement the IIPP and with other violations such as injuries, illnesses and fatalities, and then some work to see where the violations are repeated over time with the IIPP, what kinds of violations, whether ineffective hazard violation, ineffective training or ineffective hazard correction, and what components seem to have the most impact and when the firm is not getting it right.

Mr. Welsh stated that he also believes that the permit issue in construction is very interesting and it illustrates how there can be interaction between a requirement that puts a particular activity on the radar, like construction permitting for high hazard. Since 1991, California has used the permit process to make sure that every employer that gets a permit has an IIPP. It may be difficult to sort out what the limit in fatality experience is from the permit process versus the IIPP, and it may be difficult from a research stand point, but clearly the interaction has got to be very powerful. Mr. Welsh stated that he believes it may be interesting to look just at permitted worksites and see what their experience has been before and after 1991. Mr. Welsh stated that he

appreciates the difficulty of doing that study before 1991 because there was no IMUS. Finally, he stated that the sophistication in applying IIPP should improve over time.

Chair McNally stated that Cal/OSHA has identified issues and approached these new issues in a new way and that has been applied to the heat illness prevention program. Mr. Welsh stated that that is what they tried to do and it was quite an experiment because they tracked fatality rates. Chair McNally asked Mr. Welsh to speak about the program because they worked on it together and it has been successful. Mr. Welsh stated that he remembers that when the field sanitation requirements were implemented in the 1990s, people complied with the program but with a great deal of resistance every step of the way. When Cal/OSHA adopted its emergency standard in 2005, the agricultural industry really embraced what Cal/OSHA did, and Mr. Welsh thought it was a first, because it seemed that Cal/OSHA agreed with the industry that it was trying to regulate; and putting in place a new requirement required a culture change; they had 12 fatalities in 2005 which were in agriculture. Cal/OSHA began to partner in 2005 and 2006 with the agriculture industry and implemented a lot of training with the FLCs and with other groups, and that was done at the same time that Cal/OSHA was rolling out pretty hard-hitting enforcement through a sweep program and stepping up the enforcement steadily from 2006 and beyond. Last year, Cal/OSHA did about 3,500 outdoor inspections, and less than half were in agriculture. Mr. Welsh stated that California does far more inspections than any other state. As Cal/OSHA was tracking what was happening, it saw fatalities drop from 12 to 8 from 2005 to 2006; that was at the same time, 2006, the year of the horrible heat wave that killed 150 people not at work, so the non-occupational fatality rate skyrocketed from fewer than 30 in 2005 to over 150 in 2006. At the same time, the occupational rate was dropping from 12 to 8, and since 2006, it has dropped fairly steadily and there has been only one occupational death this year and one the past year. Mr. Welsh stated that he believes that they have made a lot of progress in fatalities and the compliance rate has gone from 35 percent in 2006 to 85 percent in 2010. As Cal/OSHA tries to track the impact on what it is doing on the actual experience in the field, it is finding that the message has gotten across to employers; employers are coming into compliance, and fatality rates have dropped significantly. There is a feeling that everyone is watching, partly because there is a massive media campaign that Cal/OSHA has completed. People feel that if they are not complying, someone will report them. Mr. Welsh stated that Cal/OSHA is doing this because it makes sense.

Chair McNally stated that employers do feel that Cal/OSHA is watching and more importantly, that Cal/OSHA is listening. Chair McNally stated that there has been a culture change in a fairly short period of time, and employers feel that Cal/OSHA is listening to the criticism and comments about how difficult it is to implement the standards and then is adjusting the procedures. Chair McNally stated that listening to labor has also been part of the change. Chair McNally thanked Mr. Welsh. Mr. Welsh stated that he has visited Chair McNally's operations and stated that they are well run. Mr. Welsh stated that he would like to thank Department of Industrial Relations (DIR) Director John Duncan because he has been instrumental in implementing these programs. Mr. Welsh stated that in the beginning of the past decade, industry seemed like a monolith and Cal/OSHA was like a "barking dog," and now, a substantial portion of the business community has come out to say that it does not want to eliminate Cal/OSHA and wants to work with Cal/OSHA and that it wants Cal/OSHA to deliver effective service. Mr. Welsh stated that this is a huge change in the business culture of the State of California in terms

of the attitude toward the government, and that this culture change has helped Cal/OSHA and DIR produce the results that they wanted to produce in the heat illness prevention campaign.

Commissioner Culbreath asked if a lot of the requests for services from Cal/OSHA were for training, and Mr. Welsh responded that a lot of it was training but a lot of it was policy enforcement. Mr. Welsh stated that they just got a bill signed into law over the summer that will help sustain serious citations on appeal because business recognizes the need for serious citations to be upheld when they are legitimate. Mr. Welsh stated that he sees a shift in culture, and it is an opportunity for labor and management to work together, and that is consistent with what the new governor is saying Cal/OSHA should do.

Bruce Wick, California Professional Association of Specialty Contractors (CALPASC), stated that he has spent a lot of time as a safety consultant since 1991; most typically, construction and non-construction consultants have briefly asked whether employers is following the IIPP. This has changed so that employers are following the IPPP. Mr. Wick asked whether Cal/OSHA has held re-inspections and if there has been an improvement in the IIPP; he also asked how workers' compensation safety consultants perform. He stated that many of the workers' compensation consultants do not check OSHA history and do not check to see if there is an effective IIPP, and there are hundreds of those inspectors across the State. He stated that it would be nice to know as part of this report what percentage of consultants focus on the IIPP. He stated that the IIPP is especially great for small employers. He stated that his second point is that the IIPP is a baseline program which gets you going. Mr. Wick stated that he understands why the Mendeloff study focuses on the fatality rate because the fatality data are more credible, but an IIPP will not affect fatality rates that much; what does affect it are all the innovations that business, labor, and Cal/OSHA have done together. California has the most effective rates in construction and in the country, and that reduces a lot of fatalities unrelated to the IIPP. He stated that he would hesitate to go too far and state that the IIPP would have a significant impact on fatalities.

Working Safer or Just Longer? The Impact of an Aging Workforce on Occupational Injury and Illness Costs

Frank Neuhauser, UC Berkeley

Frank Neuhauser thanked Commissioner Wei for being chair last year and stated that all research being presented today was developed under Commissioner Wei's tenure. Mr. Neuhauser stated that the agenda at today's meeting speaks well of what the Commission is doing in California and nationally. He stated that the presentation will review the impact of an aging workforce on the workers' compensation system and other similar programs. This study was completed for the Commission with co-author Anita Mathur.

Mr. Neuhauser stated that some of the concerns about the aging workforce are that baby boomers who are aging are by far the largest cohort in the population that the U.S. has seen move through the different demographic age groups; there are hundreds if not thousands of demographers who are studying this age group during their entire career. The baby boomers are moving into the age 55 and older group, and they will have eligibility for some of the aging programs like Medicare

and Social Security, so the issue will always be at the top of the agenda. Another issue is that the retirement age for people to quality for Social Security in the U.S. has been raised by several years, meaning that people will be working longer. In addition, people are working longer because they are able to work longer because they are living longer and their health is better, Also, if people are going to live longer, then they have to have saved up a lot of money for retirement years. Finally, people in this older generation experienced financial setbacks in 2000 and 2008 which damaged their financial position and required them to work longer. The question for the workers' compensation community is how those factors will affect injury rates and the cost of workers' compensation; the question is whether there is a need to accommodate that process about the older workers in a way that was not anticipated.

Mr. Neuhauser stated that a demographic like an aging workforces matters for a number of programs, including workers' compensation, which deal with a broad range of people of all ages. The majority of people in the workforce are not older workers, even though that group is doubling in size; as a fraction of the workforce, it is still a minority of workers so it does not affect workers' compensation quite the way that people often think. For age-specific programs like Medicare and Social Security, it is incredibly critical, and programs like Medicare and Social Security are facing some real concerns (Medicare much more so than Social Security). Mr. Neuhauser stated that he will come back to address these concerns because Medicare's concerns about its solvency are going to have a big impact on workers' compensation. In addition, based on the study, there are surprising findings on injuries as related to gender and under-reporting of injuries for older workers after age 64.

Mr. Neuhauser stated that the first case the study reviewed involved two things in the process which determine the impact of the aging of the workforce on workers' compensation: the first one is the frequency of injury for the aging workforce; and the second one is what aging means for the cost of those injuries once they occur. Regarding the issue of injury frequency, people are familiar with the common wisdom that injuries decline with age due to safety and experience. However, maybe the most important reason that injuries decline with age is that older workers are in less risky jobs. As one gets more experience, one may move from a line job to a supervisor's job which is much safer, or from a framing carpenter to a finishing carpenter, which is also much safer. This type of transition as workers grow older has much more effect on safety than experience.

Mr. Neuhauser stated that the study identified all the workers who are in the Current Population Survey (CPS) in California. CPS is used for unemployment and healthcare insurance statistics, and it is a very large national study. This study reviewed a period of time in California and used CPS codes for occupation and industry for each worker in the CPS to the three-digit level. For a previous study for CHSWC on the underground economy and underreporting of payroll, Mr. Neuhauser linked all those combinations of three-digit occupation and injury codes to a workers' compensations premium classification. There are about 10,000 occupation-industry pairs in CPS and 500 workers' compensation classifications. So the workers' compensation classifications allow this study to identify very precisely the level of risk in each job for each worker in the CPS. The study calculated that risk and the exposure, in terms of the hours worked. This analysis revealed that as people age, they move from more risky jobs to less risky jobs; this happens more so for men than for women. After the age of 35 to 45, men start moving much

safer jobs. The trend is not so clear for women; women are in much safer jobs traditionally, but the risk of their jobs does not change as much over their lifetime. Mr. Neuhauser stated that one would expect that older workers would have many fewer injuries simply as a function of being in safer jobs.

Mr. Neuhauser thanked Martha Jones at the Division of Workers' Compensation (DWC) for giving him the data from the Workers' Compensation Information System (WCIS) to calculate what the injury rates should be for each of these age groups based on the risk of jobs and hours worked. The study then compared this to the injury rates for each of these age and gender groups across all ages and for the two genders. The results are quite striking. Mr. Neuhauser stated that the analysis showed that for men, as they get older, they get safer. Experience seems to lead men after the ages of 18 to 24 to have fewer injuries, and the study is controlling for the risk of the job; men are getting in less risky jobs as they age, but even in those jobs, they are getting injured less often. For women, the pattern mentioned for men does not hold; after the age of 18 to 24, women's injury rates are actually higher than expected, and they stay somewhat higher than expected; they might even increase as women age. Mr. Neuhauser stated that this is important, and in the changing workforce, men are increasing in number more quickly than in the older workforce than women, and this made important impacts on expectations.

Mr. Neuhauser stated that in terms of severity of injury, it is well established that older workers have higher medical costs once they are injured, as well as longer durations of disability. The study looked at 350,000 disability cases using duration of disability as a measure of costs. There were 120 three-digit diagnoses. In this study, as one ages, the disability duration is longer substantially. This is for people whose disability duration is a week or longer; it is very similar for males and females. Unlike most of the previous research, women have shorter disability duration than men once one controls for the kinds of disabilities that they experience.

Mr. Neuhauser stated the study addressed the distribution of men and women in the workforce in the year 2000 and the projected workforce of men and women in the year 2030. With the fraction of the workforce that will be men and women in these age groups, the biggest age group is men and women 55 and over 59, and the top of the graph showed men and women in the 70 to 74 age group. In 2000, about 11% of the workforce was 55 or older. As one moves into 2030, the fraction of the workforce that will be 55 or older will be about 22% of the workforce. This is a substantial increase. The percent of older workers, in the workforce is a little higher in 2020 than in 2030 as the baby boomers are actually aging through the process. This is a significant increase in the fraction of workforce that is 55 or older, but this is not a huge increase, since it is about 10 percentage point increase in the fraction of the workforce that is over 55. Mr. Neuhauser stated that this can have several impacts: the older workforce is increasing by 11 percent in 2000 to 22 percent in 2030; men are increasing in the labor force, as a percentage of the older labor force, more quickly than women; and more men are staying in the workforce. Injury rates decline after the age of 24 for men but after age 64 for women, and the duration of injury increases for both groups.

Mr. Neuhauser stated that the data do not have much impact on workers' compensation. Some of the characteristics are offsetting, and because workers' compensation covers demographics of all ages, between 2000 and 2030, the cost of workers' compensation will increase by two percent

simply because of the aging of the workforce. The costs increase because older workers have longer durations than younger workers, and men and women balance out the safety issue, but it does not mean much for the overall costs. However, it does mean a lot for other issues. When comparing injury rates for men and women who are in the same job, women's injury rates are about 20 to 60 percent higher than men's injury rate. The injury rate data are obscured in most of the data because women are concentrated in much less risky jobs. However, if one looks at the age group 55 to 64, men are about 80% of the expected injury rates and women are about 120% of the expected injury rate, about a difference of 50% in the relative injury rates, and that is an important topic to address. One possibility for the difference in injury rates is that dangerous professions where the majority of injuries occur have traditionally been men's, and the working spaces and tools might have been designed specifically for men and not be as well structured in terms of workplaces for women. Mr. Neuhauser stated that this would be an important area for future research.

Mr. Neuhauser stated that another area to highlight is the impact of workers' compensation on Medicare Starting in 2004, Medicare began to make a much more aggressive effort to recover for workers' compensation the cost of injuries that resulted in medical treatment, and it aggressively started pushing workers' compensation Medicare set asides. Medicare set asides mean that when there is a settlement in workers' compensation and that worker might be eligible for Medicare or is already eligible for Medicare, the settlement has to set aside in a separate trust fund money to pay for that workers' medical treatment, and Medicare wanted to review those cases and make sure that they were getting fair settlements. Once Medicare started to pay attention and aggressively challenge the set aside amounts as not sufficient, then Medicare would come back and charge the insurer the amount of the cost of the medical treatment. Between 2004 and 2008, the cost of the Medicare set asides (MSAs) increased from $200 Million in 2004 to $1Billion in 2008, and it will be $1.5Billion in 2010 nationally. This is a five-fold increase in four years, and it is equivalent to 4% of the medical treatment in workers' compensation. This is a result of the closer attention paid by Medicare since 2004. Another key factor of this is that the fraction of the workforce that is going to be men and women over the age of 65 and eligible for Medicare is going to almost triple. A third point of the study is what is going to happen to the risk of reported injury after 65 when people become eligible for Medicare. This is not how long workers are working, but it is controlling for the number of hours worked and the risk of the jobs, and we would expect the trends to look the same after 65 than before they were after 65. However, there is a significant break in the trend. The implication is that after people reach 65, a lot of injuries are being reported under Medicare instead of under workers' compensation, and the treatment is being received under Medicare.

Mr. Neuhauser stated that he wanted to analyze what Medicare thinks about what happens when Medicare tries to capture this money in terms of recovery, and this is in addition to what is being picked up under MSAs. The consequence is that there is going to be a lot of additional recovery for Medicare. MSAs are about 4 to 6% of workers' compensation medical treatment in 2010, and Mr. Neuhauser stated that he expects that to increase to 12 to 15% in 2020. The underreporting of injuries might increase as Medicare becomes more aggressive like MediCal has become in identifying beneficiaries who are injured at work. In addition, as a consequence of health care reform, health care insurers are likely to review this process in the same way that Medicare and Medicaid do, in that they would want to recover costs from their beneficiaries for the workplace

injuries. All of this leads to a situation, all things being equal, that age is not going to have a big impact on workers' compensation in terms of costs, but recoveries by Medicare, Medicaid, and group health insurers are potentially large factors. With all else equal, there is 2 or 3% in workers' compensation costs due to demographics, but when all else is not equal, there is potential for increases in Medicare, Medicaid and health insurers. Mr. Neuhauser stated that there should be further research on why injury rates for women are much higher when the jobless rates are higher.

Questions from Commissioners

Commissioner Culbreath asked if the study has a breakdown of the percentage of injuries by job classification and/ or industry. Mr. Neuhauser responded that the breakdown could be provided based on the current data. The next iteration will be to add the fraction of the workers in that industry who are male and female.

Commissioner Aguilar asked if people who are working longer and getting older will have physical impairments (such as balance issues) that result solely from growing older; if so, they will have an increase in permanent disability in terms of age and it would increase the cost of workers' compensation. Commissioner Aguilar asked Mr. Neuhauser if he had factored permanent disability costs into this study, and Mr. Neuhauser responded that the study did not factor in the cost that permanent disability will increase substantially over the age of 39 or 41. Commissioner Aguilar stated that she was surprised that Mr. Neuhauser does not factor the permanent disability costs in his study, and she stated that Medicare will have set asides and will have to have set asides without factoring in apportionments. She stated that furthermore, Medicare does not have apportionments for non-industrial factors of normal degenerative conditions or pre-existing non-industrial conditions. Mr. Neuhauser responded that this is a huge issue for workers' compensation in that Medicare is demanding that it be reimbursed.

Commissioner McNally asked whether the study can explain why women are injured more often across all ages. Mr. Neuhauser responded that the most likely answer is that the types of jobs that are traditionally male jobs are more dangerous and where most of the accidents occur; and now as women enter the crafts like manufacturing or transportation, a key issue might be that the workplaces are not designed for women but were designed for safety with men in mind. The other possibility is that women are in and out of the workforce more than men, as they leave for child-bearing or take leave to care for a sick parent, so women do not accumulate as much experience in safety. Mr. Neuhauser stated that this issue raises some serious concerns. Commissioner Culbreath stated that the difference may not be because of men being in jobs in traditional industries more than women, but that in the industries in which women have jobs, the jobs have become more strenuous.

Public Comments and Questions

Len Welsh stated that the statistics that women are injured at a higher rate than men is provocative, and he asked if there can be a breakdown of the injury to indicate whether the injuries are ergonomically related or whether they are musculoskeletal injuries, or another type

of injury; a breakdown may help to answer this question. Mr. Neuhauser responded that he knows the breakdown of the injuries but he does not know how within specific class code the injuries may differ between men and women. The Workers' Compensation Insurance Rating Bureau (WCIRB) can give a breakdown by gender, and then analysis can be done to determine whether there were real differences in the types of injuries that men and women experience. Mr. Welsh replied that analysis by industry and occupation would be helpful, and Mr. Neuhauser responded that they will work on getting this data.

CHSWC Vote

Commissioner Aguilar moved to approve to post for feedback and comment the draft report "Working Safer of Just Longer? The Impact of an Aging Workforce on Occupational Injury and Illness Costs" and then finalize after the 30 days, and Commissioner Wei seconded. The motion passed unanimously.

Report on Liens

Judge Lachlan Taylor, CHSWC

Due to technical difficulties, a full record of Judge Taylor's presentation and public comments is not available. This summary is prepared based on staff notes.

Judge Taylor informed the audience that the Legislature created the Commission, made up of employer and employee representatives, to examine the workers' compensation system and to make recommendations for improvements. Judge Taylor stated that he is a workers' compensation judge serving on the staff of the Commission. Judge Taylor stated that he was presenting a draft report to the Commission to consider for adoption. The Commissioners will also hear oral public comments today before they decide whether to adopt the draft report. The decision of the Commissioners is advisory, and if the Commissioners adopt the report, it will be up to the Legislature or the Division of Workers' Compensation to decide whether and how to act on the recommendations, as the Commission was not a law-making body. Judge Taylor stated that the purpose of the presentation is to submit the draft report for the Commission's consideration. He stated that the Commissioners have previously been furnished with the draft and with the written public comments that have been received.

Judge Taylor stated that since the Commissioners already had the draft report, he would only address highlighted points from the draft report. Judge Taylor said that they estimate between 334,000 and 370,000 liens were filed in 2010, based on data available through September 2010. He stated that final numbers will come in over the next few months. He stated that the Workers' Compensation courts are unable to cope with this volume, and they are overwhelmed by the liens. He stated that there are many good laws on the books, but they are not being enforced because the courts cannot do it under these circumstances.

Judge Taylor stated that the most controversial recommendation in the draft report is instituting a $100 filing fee to deter filing liens. He stated that this would reduce the number of liens filed in

the courts. This would give the courts a "fighting chance" of applying the law to the cases that need to be filed. He stated that a filing fee has been applied in the past, and refers to Figure 1 in the draft report. He stated that it works to reduce lien filings, but that there are also drawbacks as evidenced in the submitted public comments. One drawback is that the lien claimant has to pay the filing fee but does not get it back until the case is adjudicated *after* the injured worker's case is adjudicated, if the lien claimant gets it back at all. Lien claimants often have to waive return of the lien filing fee in order to be paid through a compromise. Judge Taylor stated that these are serious problems, but no more serious than the current situation of making a lien claimant wait.

Judge Taylor stated that other recommendations made in the report would mitigate those problems, such as diverting pure fee schedule disputes out of the lien system and into an administrative bill review system for fee schedule determinations. He stated that judges are not experts on fee schedules and that fee schedule issues would be resolved more quickly if handled by experts. He stated that other recommendations include quick access to adjudication so that successful lien claimants will actually get their filing fees reimbursed. In addition, he stated that the rules should be modified so that liens do not all have to be deferred until the worker's case is resolved. Judge Taylor stated that only the liens that involve the same issues that are in dispute in the worker's case need to wait for the worker's case. He stated that resolving other liens earlier would reduce the disputes that affect workers' cases. He stated, for example, that there may be adjusters refusing to recognize the treating physician or there may be physicians treating in defiance of a medical provider network (MPN), but either way, the worker is caught in the middle. Earlier resolution of such issues would remove the need for prolonged lien cases that fill up the courts.

Judge Taylor stated that the study found that the most frequent issue in medical liens, after fee disputes, was treatment by providers whom the claims administrators refuse to authorize. Treatment authorization is addressed in Recommendation #8. He stated that Recommendation #10 on authorization, however, should be withdrawn, because public comments from people like Judge Faust and Judge Vaughan, have suggested faults in that recommendation.

Judge Taylor stated that the statutes of limitations proposed in both Recommendations #13 and #14 would set limits based on the date of medical services. Recommendation #13 is for a system going forward which would require a timeline for billing, objections, and submitting for resolution. He stated that this recommendation is based on a working group convened by the Department of Insurance; he stated that the working group did not complete its task, but was approaching consensus on the timeline for billing and dispute resolution, and for improving the communication between the biller and the payor. Judge Taylor stated that there are complaints on both sides about communication. He stated that once the parties have reached an impasse, it must either be brought to the court or be let go. He stated that a limitation of a year and a half or a couple of years from the date of service would be reasonable. The other statute of limitations recommendation, Recommendation 14# emphasizes a timeline of three years from date of service. He stated that the exact number of years is not critical, but the point is to have an outside limit for such cases to be decided. He stated that it is expected that a direct provider of medical services ordinarily will identify the expected source of payment before rendering service. Lien claimants in workers' compensation are rarely charity providers who just happened to discover a potential workers' compensation case. Judge Taylor stated that the first thing a medical office

requests is an insurance medical card, so that the office will have some idea of how payment will be provided, and the second thing is a questionnaire about whether the injury happened at work. Recommendation #17 would make an exception for health insurers and publicly funded programs that do reimburse providers or provide direct treatment on a non-occupational basis.

Judge Taylor stated that several of the recommendations address to problems of lien representatives whose authority is unclear. This has been a problem with as many as four representatives showing up, all claiming to represent the owner of the same lien. Judge Taylor asked that Recommendation #20 be withdrawn because public comments have demonstrated faults in that recommendation. Judge Taylor noted that one public comment had suggested that the owner of the lien claim be required to file a Substitution each time they change representatives, so that there will not be multiple hearing representatives, and he said that this would be another good idea for future consideration.

Judge Taylor stated to Commissioners that he would ask for authorization to put the entire public comment file on the Commission's website.

Judge Taylor stated that at least half of the public comments received addressed interpreter liens, which were very frequent, albeit for relatively small amounts compared to hospitals. He stated that where there are frequent liens, it is often because the law is ambiguous, and the courts require people instead to negotiate and make compromises. As a result, whatever the public policy is is not being applied. He stated that this holds for interpreters. He stated that the recurring issues were which events (services) were covered for interpreters at a defendant's (employer's) expense, and what should the rates be. He stated that the recommendations do not have the Commission taking sides in these disputes, rather merely recommending that the issues be clarified unambiguously in regulations so that lien claimants do not have to fight with adjusters over the same issues time after time and expect payment where payment is not required.

Judge Taylor stated that the recommendation would, however, have the Commission take sides on another issue, which is the practice of billing for charging full rates for multiple cases at the same time. Contrary to what has been argued in written public comments, he stated, it is considered unethical for lawyers to double bill for their time, and lawyers do lose clients when they do this. Those clients are "willing buyers" who have the choice to fire those lawyers. Insurers often do not have a choice about which interpreters are hired. When insurers are "unwilling buyers," then fee schedules and rules are necessary to take the place of a free market, and those fee schedules have to be reasonable. He stated that the Administrative Director needs to come up with fee schedules with fair market values.

Judge Taylor stated that wherever disputes are common, it indicates where the law needs to be clarified by regulation or statute so that there will be fewer disputes and the courts can enforce the law in the disputes that remain.

Questions from Commissioners

Commissioner Steinberg asked Judge Taylor why the problem seems to currently be in Southern California and not Northern California. Judge Taylor responded that there was a cultural difference in the south compared to the north. He stated that his experience has been exclusively in the north, and stated that once something has taken root, it is very difficult to uproot. He stated that responsibility should be shared, and that his colleagues in South California were known to accept gifts from lien claimants - TV sets, nice cocktail parties - and that it was considered part of the business landscape. Judge Taylor posed the question whether that may have influenced any decision to crack down on the lien issue. He stated that many years ago he was offered a job in Southern California as a claims supervisor although he was not qualified for that position. He posed the question why anyone would take claims personnel who were so inexperienced and put them in positions like that. He stated that there is something going on in Southern California that he does not quite fathom. He stated that he did know that there was one judge who was heroically trying to take control of the situation, Judge Frank in the Los Angeles office, and what is happening is that many lien claimants are now migrating away from the Los Angeles board and filing in neighboring boards. He stated that Judge Faust who was an expert in liens is now working for the Zenith Insurance Company and now urges the other boards to follow the lead of the Los Angeles board in taking control of the situation. He stated that he wished he knew more, but that there seems to be a cultural difference.

Public Comments and Questions

Chair McNally stated that a number of written comments by members of the public had been submitted prior to the meeting. He then invited public comment, to be made within a three-minute limit, and comments were presented by the following:

- Bruce Wick
- Dan Lowen
- Jeff Trombacco
- Nancy Roberts
- David Robin
- David Ford
- Chris Alcala
- Robert Heywood
- Steve Cattolica
- Gilbert Calhoun
- Dan Jakle
- Isis Bolanos
- Maria Palacio
- Andrea Manriquez
- Ginelle Asha
- Scott Abbey
- Linda Atcherley
- Steve Snyder

Bruce Wick, Director of Risk Management, California Professional Association of Specialty Contractors (CALPASC), recommended moving forward with a number of the recommendations since the injured worker does need a quick resolution to the dispute. He strongly supported Recommendation #8, that disputes over assertions of MPN control over medical treatment should be brought to adjudication promptly. He stated that the following recommendations should be expedited: 1, 7-9, 11-14, 18, 21, and 29.

Don Lowen, President, Pinnacle Lien Services, stated that many judges force parties to settle liens in Northern California, but this does not occur in Southern California. He also stated that a filing fee creates a lower value for claims. The cost of moving the lien dispute forward is often more than what the cost of the claim is. A filing fee could lead to eliminating smaller providers as they would not find it cost-effective to pursue the lien. He also stated that carriers are impermissibly down coding bills; in addition, carriers could not identify a reason for the lien. He stated that 20% of the liens were not authorized for medical treatment, and that the reason for the lien is not stated, and this is an unacceptable ratio.

Jeff Trombacco, Attorney, Los Angeles, stated that he is against a filing fee. Workers' compensation carriers are charging only the lien claimant, although this is a dual problem. He stated that a filing fee is unilateral punishment and it should be bilateral. In addition, if a filing fee is instituted, there will be an initial increase in lien filings; after that, it is not known what will happen. He also stated that a substantial negotiating advantage would be given to defendants because the cost for the lien fee would be on the claimants' side. He stated that the filing fee discourages settlement.

Nancy Roberts, Chief Counsel, Boehm & Associates, stated that her firm represents lien claimants. She stated that county hospitals do in fact provide charity care and stated that the exception in Recommendation #17 should be extended to county hospitals as well.

David D. Robin, Attorney, The 4600 Group, asked where the filing fee would be applied. He stated that he is not in favor of an employer contribution for the filing fee. Mr. Robin stated that Recommendation #17 would apply to carve outs and stated that he agreed with it. He stated that proceeds from the filing fee should be used purposefully; he stated specifically that the estimated $15 million generated should fund programs to develop a fee schedule.

David Ford, Associate Director, California Medical Association (CMA), said that the research and report did not address providers and the fact that the vast majority of physicians dislike filing liens. He stated that the report ignored where these liens are coming from, such as delayed authorizations.

Chair Wei asked about CMA's members' experience with filing fees and whether the $100 filing fee was an incentive for carriers to underpay claims.

Chris Alcala, Alcala Associates Los Angeles, which represents lien claims, stated that in the past, the filing fee created a lot of litigation for that fee to be reimbursed. Commissioner Wei stated that the fee may not be reimbursed.

Steve Cattolica, CSIMS, stated that there was a need to understand the comments and change the recommendations prior to the report being submitted to the Legislature. He stated that there should be a working group to incorporate the public comments. Commissioner Wei asked if CSIMS had submitted written comments, and Mr. Cattolica stated that the members of CSIMS have submitted written comments. Commissioner Wei stated that that was the purpose of the feedback period.

Dan R. Jakle, Vice President, ARS, stated that 75% of liens are paid and 20% are settled with negotiation; the remaining 5% are the ones that are disputed. He stated that based on his experience, photocopy services are usually routinely paid, but then a company will all of a sudden deny the services and they have to file a lien in response. He stated that such denials were inexplicable to him.

Gilbert Calhoun, President, California Workers' Compensation Interpreters Association (CWCIA), stated that with panel QMEs, payment is required in 60 days; there are no negative consequences if the bill is not paid on time, even after years have passed. He stated that interpreter liens are routinely denied by insurers, and stated that there were many illegal denials that are not being enforced. Judge Taylor stated that regulations for interpreters are needed to clarify their role. Commissioner Wei stated that the Commission has no interest in decreasing or denying interpreter services.

Isis Bolanos, Chief Operating Officer, Santana Lopez & Associates, Professional Language Services, stated that the report did not investigate the causes of interpreter liens. She also stated that the carriers do not pay in a timely manner and that forces filing of liens.

Maria Palacio, Managing Partner, State Certified Interpreter, Professional Interpreting LIC, stated that bills are paid many years later and that the law is not being enforced. It was noted by a member of the public that the Division of Workers' Compensation (DWC) publishes data on promptness of payment reporting.

Andrea Manriquez, LMIS, Inc., stated that California Code of Regulations (CCR) 9785, 9781, and 9795.4 allow filing a lien by interpreters.

Johnella Shackelford, injured worker, stated that expedited hearings are clogging the courts, and she stated that utilization review is still not being done.

Scott Levy, MD., Kaiser Permanente and Western Occupational and Environmental Medical Association (WOEMA), stated that he agrees with a number of the recommendations in the report.

Liliana Loofbourow, state-certified Spanish interpreter, stated that if a $100 filing fee was instituted, it would put interpreters out of business. She asked what percentage of liens filed should have been paid.

Linda Atcherley, California Applicants' Attorneys Association (CAAA), said that it would be great if the number of interpreters increased. She asked how a lien fee would be processed.

Steve Snyder, third-party filer, stated that written comments about the study were submitted.

Commissioners Wei and Schwenkmeyer stated that Recommendations 10 and 20 should be deleted from the report.

Commissioner Steinberg stated that he was troubled by the comments that were received and the conclusions of the report. Ms. Baker stated that every comment was reviewed and most of the comments were incorporated. Commissioner Steinberg stated that he has concerns about the filing fee and that there should be rethinking of some of the recommendations.

Commissioner Aguilar stated that she would request that the synopsis that the staff prepared be part of the attachment to the report. She stated that she has concerns about the $100 filing fee because it was difficult to implement in the past and there were frivolous claims. She suggested that the wording of Recommendation 1 be changed to "**consider** reinstituting a filing fee."

Commissioner Wei stated that she shares the same concerns that have been expressed, but that the report is a first step in the process and it is important to make progress and to continue discussion.

CHSWC Vote
Commissioner Wei moved that Recommendations #10 and #20 be deleted and Recommendation #1 be revised to read "Consider reinstating a filing fee for medical and medical-legal liens," as well as to approve the revised report for final release and posting, and to post alongside the report the written public comments submitted to the Commission. Commissioner Steinberg seconded. The motion passed unanimously.

Executive Officer Report
Christine Baker, CHSWC

Ms. Baker stated that Commission staff was subject to furloughs, which made things very difficult. Lach Taylor is currently the only one that is subject to continued three furlough days a month and we are subject to one floating furlough. Despite that, the team has been working very hard to prepare various reports, develop MOUs and holding advisory meetings to address your requests. Ms. Baker stated that she would like to take the time to recognize the CHSWC staff: starting with Judge Lachlan Taylor; Irina Nemirovsky, lead analyst, who was off a large part of this year on pregnancy leave and is now back; Nurgul Toktogonova who has been the key data analyst on many of our studies; Nabeela Khan, research specialist, and Chris Bailey, research specialist; and Selma Meyerowitz, who works on editing and quality control of our documents; and finally, key administrative assistants, Chellah Yanga and Oliva Vela, without whom the Commission could not function.
Ms. Baker stated that staff worked tenaciously on the annual report. This was particularly more difficult this year because of trying to obtain information from the agencies, which all experienced furlough problems and backlogs and data updates were difficult to obtain. She

stated that she can happily advise you that staff has been persistent and did get all the information and cooperation from the divisions and the department. The first final draft of the Annual Report was included in the Commissioners' package. Since that point, a few minor adjustments to the data from DWC are needed. Those will be updated in the posting of the document. A series of recommendations that come from our research and our work as well as from studies that you have approved is included. She requested approval of the report for posting and distribution.

CHSWC Vote
Commissioner Aguilar moved to approve for final release and posting, pending final edits and update of some data points, the 2010 CHSWC Annual Report, and Commissioner Schwenkmeyer seconded. The motion passed unanimously.

Report Card
Ms. Baker stated that as part of its mandate to conduct a continuing examination of California's health and safety and workers' compensation systems, CHSWC staff has prepared the "Selected Indicators in Workers' Compensation: 2010 Report Card for California," summarizing key workers' compensation and health and safety information. It is intended to be a reference for monitoring the ongoing system and serve as an empirical basis for proposing improvements. This Report Card is a compilation of data from and for the entire workers' compensation community.

- California Department of Insurance (CDI)
- Workers' Compensation Insurance Rating Bureau of California (WCIRB)
- National Association of Social Insurance (NASI)
- United States Bureau of Labor Statistics (BLS)
- Division of Workers' Compensation (DWC)
- Division of Labor Standards Enforcement (DLSE)
- Division of Occupational Safety and Health (DOSH)
- Division of Labor Statistics and Research (DLSR)
- Office of Self Insurance Plans (OSIP)

Ms. Baker requested approval of the Report Card, which is in essence the statistical portion of the annual report.

CHSWC Vote
Commissioner Wei moved to approve for final release and posting, pending final edits and update of some data points, the "Selected Indicators in Health and Safety and Workers' Compensation: 2010 Report Card," and Commissioner Schwenkmeyer seconded. The motion passed unanimously.

Evaluation of System
Ms. Baker stated that at the last Commission meeting, Commissioner McNally requested that the staff review additional measures for inclusion in our system monitoring. CHSWC staff met with a group of interested parties via conference call. The goal was to identify key indicators that could be included to evaluate how well the system is doing for injured workers and employers. Our preliminary findings are included in our memo. There was interest in reinstating the promptness of first payment report. DWC is working on publishing the data by claims administrators.

Ms. Baker also stated that the employer group brought up additional concerns such as court delays and performance, liens, Disability Evaluation Unit (DEU) backlogs and other problems. They suggested that data should be compared between insured, private and public self insured data. The memo includes several recommendations: determine if an ongoing report of promptness of first payment could be developed with a break down between private self insured, insured and public self insured; determine if going forward, medical provider networks (MPNs) could be identified in the data base in order to make comparisons; and determine if utilization review and timeliness of decisions could be done.

Ms. Baker stated that CHSWC staff would also have to determine the budgetary costs for such proposals. Approval of the memo is requested, and staff would report back to the Commissioners as needed.

CSHWC Vote
Commissioner Aguilar moved to approve for final release and posting the report and next steps for the "System Monitoring Memo," and Commissioner Wei seconded. The motion passed unanimously.

Worker Occupational Safety and Health Training and Education Program **(***WOSHTEP)*
Ms. Baker stated that according to Labor Code Section, the 2010 WOSHTEP Advisory Board Annual Report has been prepared and is ready for approval. This report has been reviewed and approved by the advisory board to the program. Ms. Baker stated that since its inception in 2003 through 2010, WOSHTEP has served over 9,200 workers and over 850 employers, through close to 4,500 hours of instruction. All aspects of the program and all accomplishments are described in the 2010 Annual Report. She requested approval of the 2010 WOSHTEP Advisory Board Annual Report.

CHSWC Vote
Commissioner Wei moved to approve for final release and posting the "2010 WOSHTEP Advisory Board Annual Report," and Commissioner Aguilar seconded. The motion passed unanimously.

School Action for Safety and Health (*SASH) Program*
Ms. Baker stated that another training program under the Commission's auspices is the School Action for Safety and Health (SASH) program. The goals of the SASH program are to help school districts develop effective health and safety programs in school districts across the State, as well as help schools develop and implement an effective IIPP, so that school injuries and

illnesses can be reduced. SASH program materials are available on the CHSWC website and statewide trainings are ongoing.

Commissioner Aguilar stated that she had attended one of the SASH trainings and thought that it provided excellent information and that the school district staff who attended found it very valuable. She stated that it was a very impressive program.

Model IIPP Training Program
Ms. Baker stated that included in the Commissioners' packets is a proposal for funding an initial phase of developing a model Injury and Illness Prevention Program (IIPP) training program to be developed by the University of California (UC), Berkeley Labor Occupational Program (LOHP) to assist employers and employees to effectively develop and implement IIIPPs. The proposal is for $20,000 of CHSWC funding. Ms. Baker stated that IIPPs are required in California workplaces and are a critical component of any health and safety program because they establish key procedures for protecting the health and safety of employees. This is particularly important right now, because the WOSHTEP program was cut back significantly, and projections are that there should be we enough funds from the CHSWC to budget to cover the development of this injury and illness prevention program. Funding would be only for the first phase, and when that is complete and funding issues are clarified, another $20,000 may be needed for dissemination.

Ms. Baker stated that the proposed first phase of the program will focus on: (1) adapting a successful training program, currently designed for school district employees, the SASH Program, that prepares key staff to develop and implement effective IIPPs; and (2) adapting existing school district IIPP materials for use by key staff in general industry as they carry out their safety and health activities. This program would be especially timely given that federal OSHA is considering promulgating a federal IIPP standard, modeled on Cal/OSHA's IIPP standard. Development and implementation of the proposed training program and IIPP materials would allow the CHSWC to take a leadership role in creating a model that can useful nation-wide. She asked for approval of the contract and proposal.

CSHWC Vote
Commissioner Aguilar moved to approve the contract and proposal for UC Berkeley LOHP for $20,000 from fiscal year 2010-11 to develop an IIPP program for employers, and Commissioner Steinberg seconded. The motion passed unanimously.

International Forum on Disability Management 2010: Collaborating for Success
Ms. Baker stated that as part of its commitment to disability management, CHSWC and the Department of Industrial Relations (DIR) collaborated with the International Association of Industrial Accident Boards and Commissions (IAIABC) to host the International Forum on Disability Management (IFDM) 2010: *Collaborating for Success*, in Los Angeles on September 20th through 22nd. The Forum was devoted to multinational dialogue on disability management. Held every two years since 2002, IFDM is the only global conference dedicated to in-depth discussion of problems, trends and best practices in disability management. A major goal of IFDM is to bring key policymakers into the discussion and be an agent of change.

Ms. Baker stated that IFDM 2010 brought together over 400 attendees, representing over 33 countries across the world, from the health, safety, and workers' compensation communities. It was highly successful and acclaimed.

Class Action Suits in Workers' Compensation
Class Actions in Workers' Compensation –Shall the Commission recommend to the Chair of the Appeals Board that they promulgate rules of practice and procedure for mass litigation.

CHSWC Vote
Commissioner Culbreath moved to approve the next steps for the "Report on Class Action Suits" and to send a letter to the Workers' Compensation Appeals Board (WCAB), and Commissioner Aguilar seconded. The motion passed unanimously.

Other Business

None.

Adjournment

The meeting was adjourned at 1:15 p.m.

Approved:

_____ _____

Sean McNally, Chair Date

Respectfully submitted:

_____ _____

Christine Baker, Executive Officer Date